TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 17.

JESSIE R. THOMPSON, PLAINTIFF IN ERROR,

vs.

CHARLES N. THOMPSON.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FILED JUNE 28, 1906.

(21,242.)

(21,242.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 188.

JESSIE E. THOMPSON, PLAINTIFF IN ERROR,

vs.

CHARLES N. THOMPSON.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 22, 1909.

In the Court of Appeals of the District of Columbia.

No. 1875.

JESSIE E. THOMPSON, Appellant,
vs.
CHARLES N. THOMPSON.

a Supreme Court of the District of Columbia.

Law. No. 50145.

JESSIE E. THOMPSON, Plaintiff,
vs.
CHARLES N. THOMPSON, Defendant.

UNITED STATES OF AMERICA, *District of Columbia, ss:*

Be it remembered, that in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above entitled cause, to wit:

1 *Declaration.*

Filed January 1, 1908.

In the Supreme Court of the District of Columbia.

Law. No. 50145.

JESSIE E. THOMPSON, Plaintiff,
vs.
CHARLES N. THOMPSON, Defendant.

The plaintiff sues the defendant for that heretofore, to wit, on the 20th day of January, A. D. 1907, the defendant made an assault upon the plaintiff, and beat, bruised, wounded and ill treated her; and other wrongs to the plaintiff then and there did, to the damage to the plaintiff of ten thousand dollars, and therefore she brings this suit.

Second Count. The plaintiff sues the defendant, for that heretofore, to wit, on the third day of February, A. D. 1907, the defendant made another assault upon the plaintiff, and again beat, bruised, wounded and ill treated her, and other wrongs to her then and there did, to the damage of the plaintiff in the sum of ten thousand dollars, and therefore she brings this suit.

Third Count. The plaintiff sues the defendant, for that heretofore, to wit, on the eighth day of February, A. D. 1907, the defendant made another assault upon the plaintiff, and again beat, bruised, wounded and ill treated her, and other wrongs to her then and there

did, to the damage of the plaintiff in the sum of ten thousand
2 dollars, and therefore she brings this suit.

Fourth Count. The plaintiff sues the defendant for that heretofore, to wit, on the twenty-eighth day of April A. D. 1907, the defendant made another assault upon the plaintiff, who was then pregnant, as he, the defendant, then and there well knew, and he then and there beat, bruised, wounded and ill treated her; and other wrongs to the plaintiff then and there did, to the damage of the plaintiff of ten thousand dollars, and therefore she brings this suit.

Fifth count. The plaintiff sues the defendant for that heretofore, to wit, on the thirteenth day of May, A. D. 1907, the defendant made another assault upon the plaintiff, who was then pregnant, as he, the defendant, then and there well knew, and he then and there beat, bruised, wounded and ill treated her; and other wrongs to the plaintiff then and there did, to the damage of the plaintiff of ten thousand dollars, and therefore she brings this suit.

Sixth Count. The plaintiff sues the defendant for that heretofore, to wit, on the twenty-ninth day of May, A. D. 1907, the defendant made another assault upon the plaintiff, who was then pregnant, as he, the defendant, then and there well knew, and he then and there beat, bruised, wounded and ill treated her; and other wrongs to the plaintiff then and there did, to the damage of the plaintiff of ten thousand dollars, and therefore she brings this suit.

Seventh Count. The plaintiff sues the defendant for that
3 heretofore, to wit, on the twelfth day of June, A. D. 1907, the defendant made another assault upon the plaintiff, who was then pregnant, as he, the defendant, then and there well knew, and he then and there beat, bruised, wounded and ill treated her; and other wrongs to the plaintiff then and there did, to the damage of the plaintiff of ten thousand dollars, and therefore she brings this suit.

And the plaintiff claims Seventy thousand dollars, besides the costs of this suit.

WM. M. LEWIN,
Attorney for the Plaintiff.

The defendant is to plead hereto on or before the twentieth day, exclusive of Sundays and legal holidays, occurring after the day of the service hereof; otherwise judgment.

WM. M. LEWIN,
Attorney for the Plaintiff.

Defendant's Pleas.

Filed February 10, 1908.

In the Supreme Court of the District of Columbia.

At Law. No. 50145.

JESSIE E. THOMPSON, Plaintiff,
vs.
CHARLES N. THOMPSON, Defendant.

1. Now comes the defendant in the above entitled cause and
4 for plea to the declaration of the plaintiff filed therein, and to each and every count thereof, says he is not guilty in the manner and form alleged therein.

2. And for a further plea to the said declaration of the plaintiff and to each and every count thereof, the defendant says that the plaintiff ought not to have or maintain her action against the defendant, because, he says that at the times the causes of action mentioned in the declaration are alleged to have arisen and accrued to the plaintiff, the plaintiff and the defendant were husband and wife and were living together as such.

LECKIE, FULTON & COX,
Attorneys for Defendant.

Joinder in Issue.

Filed February 14, 1908.

In the Supreme Court of the District of Columbia.

At Law. No. 50145.

JESSIE E. THOMPSON, Plaintiff,
vs.
CHARLES N. THOMPSON, Defendant.

The plaintiff joins issue upon the defendant's first plea.

WM. M. LEWIN,
Plaintiff's Attorney.

5 *Demurrer to Second Plea.*

Filed February 14, 1908.

In the Supreme Court of the District of Columbia.

At Law. No. 50145.

JESSIE E. THOMPSON, Plaintiff,
vs.
CHARLES N. THOMPSON, Defendant.

The plaintiff says that the defendant's second plea is bad in substance.

WM. M. LEWIN,
Plaintiff's Attorney.

Among the matters of law intended to be argued in support of the foregoing demurrer is the following:

When the causes of action, and each of them, in the declaration mentioned, arose, or accrued to the plaintiff, and ever since, including the time of the institution of the above entitled suit, a wife might, and still may, in the District of Columbia, institute and maintain, in her own name and right, an action at law against her husband for assault and battery committed by him upon her.

Supreme Court of the District of Columbia.

FRIDAY, *February 28th*, 1908.

Session resumed pursuant to adjournment, Hon. Thos. H. Anderson, Justice, presiding.

* * * * * * *

6 No. 50145. At Law.

JESSIE E. THOMPSON, Plaintiff,
vs.
CHARLES N. THOMPSON, Def't.

Upon consideration of the demurrer filed herein on behalf of the plaintiff by her attorney Mr. Wm. M. Lewin, to the defendant's second plea, it is ordered that said demurrer be, and the same is hereby overruled. Whereupon, plaintiff by her said attorney in open Court, electing to stand upon said demurrer, judgment is ordered for the defendant. Whereupon, it is considered and adjudged that the plaintiff herein take nothing by this action, that the defendant go hereof without day, be for nothing held and recover of plaintiff his costs of defense to be taxed by the Clerk and have execution thereof.

From the aforegoing the plaintiff by her attorney in open Court notes an appeal to the Court of Appeals; whereupon bond for costs is hereby fixed in the penalty of One Hundred Dollars, with leave to deposit the sum of Twenty-Five Dollars, in the Registry of this Court in lieu of such bond.

Memorandum.

March 3, 1908.—Appeal bond approved and filed.

7 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia, ss:*

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 6 both inclusive, to be a true and correct transcript of the record according to Rule Five (5) of the Court of Appeals of the District of Columbia, in cause No. 50145, at Law, wherein Jessie E. Thompson is Plaintiff and Charles N. Thompson is Defendant, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 6th day of March, A. D. 1908.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 1875. Jessie E. Thompson, appellant, *vs.* Charles N. Thompson. Court of Appeals, District of Columbia. Filed Mar. 9, 1908. Henry W. Hodges, clerk.

WEDNESDAY, *April 15th, A. D.* 1908.

No. 1875.

JESSE E. THOMPSON, Appellant,
vs.
CHARLES N. THOMPSON.

The above entitled cause was submitted to the consideration of the Court on the printed record and appellant's brief filed herein, by Mr. W. M. Lewin, attorney for the appellant. There was no appearance for the appellee.

Memorandum.

April 16, 1908.—Appearance of A. E. L. Leckie, C. M. Fulton and J. W. Cox, for appellee, filed.

Memorandum.

April 18, 1908.—Brief for appellee filed by leave of Court.

No. 1875.

JESSIE E. THOMPSON, Appellant,
vs.
CHARLES N. THOMPSON.

Opinion.

(Mr. Justice ROBB delivered the opinion of the Court:)

This — an action for damages for assault and battery, and is brought by a wife against her husband. The declaration is in seven counts and avers as many separate assaults. The defendant pleaded the marriage relation; the plaintiff demurred; the demurrer was overruled, and judgment was thereupon entered for the defendant.

The sole question involved is whether a wife may sue her husband for a personal tort committed during coverture. Owing to her disabilities under the common law the plaintiff is compelled to rely upon section 1155 of the Code of the District of Columbia. That section is entitled "Power of Wife to Trade and to Sue and be sued," and permits married women to engage in any business and to make contracts whether engaged in business or not, and to sue separately upon their contracts, and also to sue separately for the recovery, security, or protection of their property "and for torts committed against them as fully and freely as if they were unmarried." The section also permits suits against married women upon their contracts, whether made before or during marriage, "and for wrongs independent of contract committed by them before or during marriage, as fully as if they were unmarried." It is further provided

that a husband shall not be liable for any tort committed separately by his wife out of his presence without his participation or sanction.

In Bronson v. Brady, 28 App. D. C., 250, we held that under the provisions of the Code a married woman might contract with her husband. The question here raised was not involved, and there is nothing in the opinion in that case which tends to elucidate it. It is true, as there stated, that a great change has taken place in the status of married women, and that they have been emancipated from much of the harshness of the common law. It is also true that an examination of the statutory enactments of the different States in favor of married women will disclose that the object and purpose of such legislation has been to further and promote the property rights and interests of married women, but not to interfere with or undermine the conjugal relations. No statute has been pointed out to us, and we have found none expressly conferring upon a wife authority to bring a suit against her husband for a personal tort. Only one decision, and that was reversed on appeal, has been brought to our attention which authorized such a suit.

In Freethy v. Freethy, 42 Barb. (N. Y.), 641, it was held that the language of section 3 of the statute of 1862 of that State, which provided that "any married woman may bring and maintain an action in her own name, for damages, against any person or body corporate, for any injuries to her person or character, the same as if she were sole," did not give a wife the right to maintain an action against her husband for slander. The court said: "When the legislature intends to make such a striking innovation of the rules of the common law and so much opposed to public policy, and the peace and happiness of the conjugal relation, as would be the case if husband and wife were permitted to sue each other for alleged wrongs to character, it should use language as will make it clearly manifest; and not leave it to the construction of the courts."

In Longendyke v. Longendyke, 44 Barb. (N. Y.), 366, it was held that the above statute did not authorize a married woman to maintain against her husband an action for assault and battery. The court said: "The right to sue her husband in an action of assault and battery may perhaps be covered under the literal language of this section, but I think such was not the meaning and intent of the legislature."

In Schultz v. Schultz, 63 How. Pr. (N. Y.), 181, it was held by a divided court that the statute above referred to authorized an action by a wife against her husband for assault and battery. This case, however, was reversed by the Court of Appeal (89 N. Y., 644).

In Abbott v. Abbott, 67 Me., 304, the question was before the court whether a wife after being divorced from her husband could maintain an action against him for an assault committed by him during coverture, and it was held that she could not, notwithstanding a statute similar to ours. The court said: "It would be against policy for the law to grant the remedy asked for in this case. * * * If an assault was actionable, then would slander and libel and other torts be * * * The private matters of the whole

period of married existence might be exposed besides." See, also, Main v. Main, 46 Ill., 106.

When the District Code was enacted it was known to Congress that similar statutes had been held by various courts of last resort not to give married women the right to sue their husbands for personal torts committed during coverture. It was also well known that to confer such a right would be radically to depart from the rule of the common law. It is, therefore, reasonable to believe that had Congress intended such a result, it would have employed language so clear and comprehensive as to leave no room for doubt or conjecture. If we hold that such an action may be brought by a wife against her husband, we must also hold that he may maintain a similar action against her, for the statute says that she may be sued for wrongs independent of contract committed during marriage as if unmarried. In our desire to accord to woman every right to which she is entitled, let us not undermine the basis of society by disregarding the sanctity of the home. Let us not furnish grist for the divorce courts. Litigation of this character between husband and wife is vicious in principal and contrary to sound public policy, and we believe not authorized by the Code.

Our conclusion is necessarily based upon the proposition that the parties to this action are one in law. We, therefore, award no costs; Abbe v. Abbe, 48 N. Y. Sup., 25.

The judgment will be affirmed, and it is so ordered.

Affirmed.

TUESDAY, *June 9th, A. D.* 1908.

No. 1875. April Term, 1908.

JESSE E. THOMPSON, Appellant,
vs.
CHARLES N. THOMPSON.

Appeal from the Supreme Court of the District of Columbia. This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia, and was argued by counsel. On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said Supreme Court in this cause, be, and the same is hereby, affirmed.

Per Mr. JUSTICE ROBB.
June 9, 1908.

THURSDAY, *June 11th, A. D.* 1908.

No. 1875.

JESSE E. THOMPSON, Appellant,
vs.
CHARLES N. THOMPSON.

On motion of W. M. Lewin, attorney for the appellant, It is ordered by the Court that a writ of error to remove this cause to

the Supreme Court of the United States issue, and the bond to act as supersedeas is fixed at the sum of three hundred dollars.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Justices of the Court of Appeals of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals before you, or some of you, between Jessie E. Thompson, Appellant and Charles N. Thompson, appellee, a manifest error hath happened, to the great damage of the said appellant, as by her complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 11th day of June, in the year of our Lord one thousand nine hundred and eight.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Allowed by

——— ———.

(*Bond on Writ of Error.*)

Know all men by these presents, That we, Jessie E. Thompson, of the District of Columbia, as principal, and Fidelity and Deposit Company of Maryland, a corporation, as surety, are held and firmly bound unto Charles N. Thompson in the full and just sum of three hundred (300) dollars to be paid to the said Charles N. Thompson, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators and successors, jointly and severally, by these presents. Sealed with our seals and dated this twelfth day of June, in the year of our Lord one thousand nine hundred and eight.

Whereas, lately at a Court of Appeals of the District of Columbia, in a suit depending in said Court, between said Jessie E. Thompson and the said Charles N. Thompson a judgment was rendered against the said Jessie E. Thompson and the said Jessie E. Thompson hav-

ing obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Charles N. Thompson citing and admonishing him to be and appear at a Supreme Court of the United States, to be holden at Washington, within thirty days from the date thereof:

Now, the condition of the above obligation is such, That if the said Jessie E. Thompson shall prosecute said writ of error to effect, and answer all damages and costs if she fail to make her plea good, then the above obligation to be void; else to remain in full force and virtue.

JESSIE E. THOMPSON. [SEAL.]
FIDELITY & DEPOSIT CO. OF MARYLAND, [SEAL.]
By W. H. RONSAVILLE. [SEAL.]
Attorney-in-Fact.

Sealed and delivered in the presence of—
CARROLL D. LANDVOIGT.

Approved by—
CHARLES H. ROBB,
Associate Justice, Court of Appeals of the District of Columbia.

[Endorsed:] No. 1875. Jessie E. Thompson, Appellant, vs. Charles N. Thompson. Bond on Writ of Error to Supreme Court U. S. Court of Appeals, District of Columbia. Filed June 22, 1908. Henry W. Hodges, Clerk.

UNITED STATES OF AMERICA, *ss:*

To Charles N. Thompson, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Court of Appeals of the District of Columbia, wherein Jessie E. Thompson is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Charles H. Robb, Associate Justice of the Court of Appeals of the District of Columbia, this twentieth day of June, in the year of our Lord one thousand nine hundred and eight.

CHARLES H. ROBB,
Associate Justice of the Court of Appeals of the District of Columbia.

Service accepted this 22d day of June, A. D. 1908.
LECKIE, FULTON & COX.

[Endorsed:] Court of Appeals, District of Columbia. Filed Jun-22, 1908. Henry W. Hodges, Clerk.

Court of Appeals of the District of Columbia.

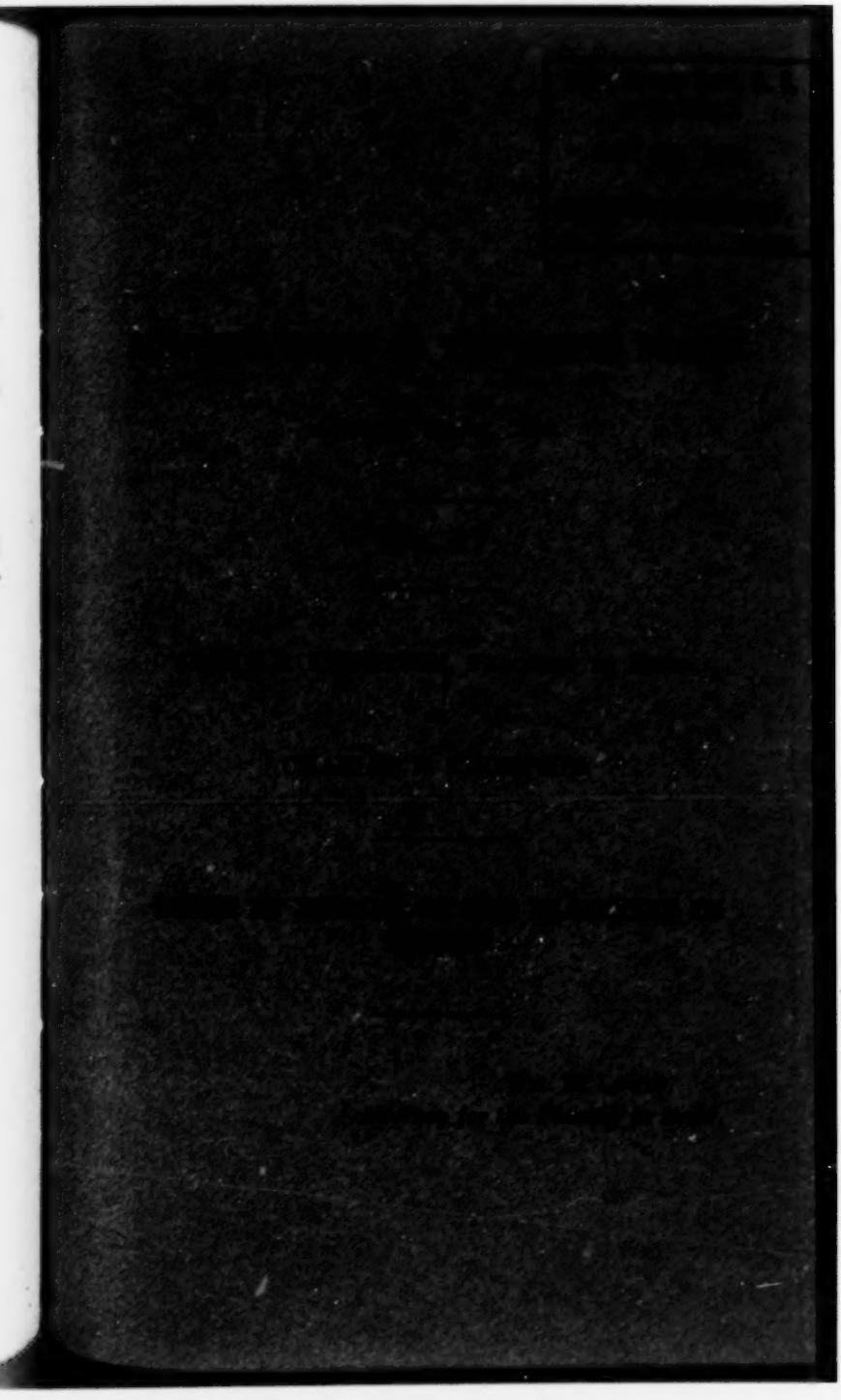
I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 11, inclusive, contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of Jesse E. Thompson, Appellant, vs. Charles N. Thompson, No. 1875, April Term, 1908, as the same remain- upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 26th day of June, A. D. 1908.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No. 21,242. District of Columbia Court of Appeals. Term No. 188. Jessie E. Thompson, plaintiff in error, vs. Charles N. Thompson. Filed June 29, 1908. File No. 21,242.



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 17.

JESSIE E. THOMPSON, PLAINTIFF IN ERROR,

vs.

CHARLES N. THOMPSON.

BRIEF IN BEHALF OF THE PLAINTIFF IN ERROR.

Statement.

The suit was begun in the Supreme Court of the District of Columbia by the plaintiff in error, against the defendant in error, for assault and battery.

The seven counts of the declaration are substantially alike, but the fourth, fifth, sixth and seventh counts contain each an allegation as a basis for exemplary damages. The declaration (R., 1, 2) is in the usual form, and in each count damages are laid at $10,000.

The defendant pleaded:

1. Not guilty (R., 2).

2. That when the assaults were made the parties were husband and wife (R., 3).

The plaintiff joined issue on the defendant's first plea (R., 3) and demurred to the second plea (R., 3).

The demurrer was overruled and judgment given for the defendant (R., 4).

Upon appeal to the Court of Appeals of the District of Columbia the judgment was affirmed (R., 7); 31 App. Cas. D. C., 557.

From the judgment of affirmance the case is here upon writ of error.

Specification of Errors.

The Court of Appeals of the District of Columbia erred:

1. In affirming the judgment of the Supreme Court of the District of Columbia.

2. In holding that in said District a wife may not sue her husband for a personal tort committed by him against her during coverture.

Upon the demurrer, under the common-law rule number 28 of the Supreme Court of the District of Columbia, then in force (1908), of which the Court of Appeals took judicial notice, every question presented by the record was before the court.

Johnson-Wynne Co. *vs.* Wright, 28 App. Cas. D. C., 375, 377.

Insurance Co. *vs.* Bohnke, 4 App. Cas. D. C., 371, 379.

The judgment upon the demurrer disposed of the whole case and is a final judgment, notwithstanding the plea of not guilty.

Wilson *vs.* Daniel, 3 Dall., 401, 403, 404.

Townsend *vs.* Jemison, 7 How., 706, 717.

Clearwater *vs.* Meredith, 1 Wall., 25, 43.

The sections of the Code of Law of the District of Columbia (1901) upon which the plaintiff in error relies are two in number, and are as follows:

> SEC. 1151. All the property, real, personal, and mixed, belonging to a woman at the time of her marriage, and all such property which she may acquire or receive after her marriage from any person whomsoever, by purchase, gift, grant, devise, bequest, descent, in the course of distribution, *by her own skill, labor, or personal exertions*, or as proceeds of a judgment at law or decree in equity, or in any other manner, shall be *her own property* as absolutely as if she were unmarried, and shall be protected from the debts of the husband and shall not in any way be liable for the payment thereof: *Provided*, That no acquisition of property passing to the wife from the husband after coverture shall be valid if the same has been made or granted to her in prejudice of the rights of his subsisting creditors.
>
> SEC. 1155. Married women shall have power to engage in any business, and to contract, whether engaged in business or not, and to sue separately upon their contracts, and also to sue *separately* for the *recovery*, security or protection of their property, and for *torts* committed against them, *as fully and freely* as if they were unmarried; contracts may also be made with them, and they may also be sued separately upon their contracts, whether made before or during marriage, and for wrongs independent of contract committed by them before or during their marriage, as fully as if they were unmarried, and upon judgments recovered against them execution may be issued as if they were unmarried; nor shall any husband be liable upon any contract made by his wife in her own name and upon her own respon-

sibility, nor for any tort committed separately by her out of his presence without his participation or sanction: *Provided,* That no married woman shall have power to make any contract as surety or as guarantor, or as accommodation drawer, accepter, maker or indorser.

D. C. Code, sections 1151, 1155.

Prior to the enactment of the Code it was essentially and in its nature a *tort* for a man to assault his wife. The effect of the provisions of the Code with respect to her *right to sue* is to remove a common-law obstacle to the remedy.

Stewart *vs.* R. R. Co., 168 U. S., 445, 448.

These provisions will be liberally construed, for it is the duty of every State to provide, in the administration of justice, for the redress of private wrongs; if there be a civil right there must be a legal remedy.

Ry. Co. *vs.* Humes, 115 U. S., 512, 521.

Bank *vs.* Owens, 2 Pet., 527, 539 (star page).

And protection against *tort* is as necessary as the enforcement of contract.

Wills *vs.* Jones, 13 App. Cas. D. C., 482, 497.

As redress cannot be obtained in equity, because of the essential character of the case, the rule is settled that *the remedy must be by a suit at law.*

Van Norden *vs.* Morton, 99 U. S., 378, 380.

The reasoning of the New York case upon which the Court of Appeals relies has long since been repudiated.

Freethy *vs.* Freethy, 42 Barb. (N. Y.), 641.

1. At page 644 the New York court cites authorities construing *penal* statutes, as if the married woman's act were

to be strictly construed, whereas it is conceded that the Supreme Court of the United States will construe it liberally.

Bronson *vs.* Bradey, 28 App. Cas. D. C., 250, 262.

2. At page 644 the New York court argues that it must follow *its own rule* that, under the statute permitting parties to testify, husband and wife are excluded as witnesses in suits between each other.

But such construction has been expressly repudiated by this court, the contrary view being necessary for the "successful enforcement of the act."

Stickney *vs.* Stickney, 131 U. S., 227, 237.

3. At page 643 the New York court's argument is that where statutes do not *expressly* include they *exclude*.

But this court declines to admit the soundness of a construction which seeks by remote *inferences* to withdraw a case from the general provisions of a statute which is clearly within its words and perfectly consistent with its intent.

R. R. *vs.* Church, 19 Wall., 62, 65.

Bryan *vs.* Kennett, 113 U. S., 179, 196.

Market Co. *vs.* Hoffman, 101 U. S., 112, 115-16.

4. At page 645 the New York court says that the wife's general right to convey does not include the right to convey to her husband.

But see Lurhs *vs.* Hancock, 181 U. S., 567, 571.

Construction broadens with legislation.

By the first (1869) and second (1874, R. S. D. C.) of the married woman's acts applicable to the District of Columbia a wife was not entitled to her earnings as a matter of right.

16 Stat. at Large, 45.

R. S. D. C. (1874), sections 727, 729.

Seitz *vs.* Mitchell, 94 U. S., 580, 584.

By the third of such acts (1896) her earnings (section 3) became her *sole and separate* property and (section 4), as well as by the former acts, she was empowered to *sue* in her own name in all matters having *relation* to her sole and separate property, *in the same manner* as if she were unmarried.

29 Stat. at Large, 193.

By the Code, the fourth and latest of such acts (1901), not only are her earnings her own property absolutely (section 1151) and (section 1154) is she permitted to hold them as fully as if she were unmarried, and (section 1155) to sue for their recovery, security, or protection, but (section 1155) she is empowered to *sue for torts committed against her* as *fully* and *freely* as if she were unmarried.

D. C. Code, sections 1151, 1154, 1155.

The difference between these sections of the Code and the earlier acts is noticeable.

A change in phraseology creates a presumption of a change in intent, and no word of the change should be held insignificant.

Crawford *vs.* Burke, 195 U. S., 176, 190.
Market Co. *vs.* Hoffman, 101 U. S., 115-16.

Even under the act of 1869 a wife could *contract* with her husband.

Sykes *vs.* Chadwick, 18 Wall., 141, 143, 148.

And now she may *sue* him, even in *tort*, for that construction will be followed which commends itself to the judgment of the court

May *vs.* May (1879), 9 Nebraska, 16, 25.
Rice *vs.* Sally, 176 Mo., 107, 130, 131.
Covlam *vs.* Doull, 133 U. S., 216, 233.

Earnings Imply Capacity to Earn.

The right to her earnings necessarily implies the right to maintain her *capacity* to earn. The right to sue any one (*the husband not excepted*) for *impairment* of that capacity is incidental thereto.

Traer *vs.* Clews, 115 U. S., 528, 540.
Seybert *vs.* Pittsburg, 1 Wall., 272.

This would follow from the construction of section 1151 *in pari materia* with section 1155.

Tel. Co. *vs.* Lipscomb, 22 App. Cas. D. C., 104, 113-14.
Asphalt Co. *vs.* Mackey, 15 App. Cas. D. C., 410, 417.
Stickney *vs.* Stickney, 131 U. S., 227, 237.

HER CAPACITY TO EARN IS HER OWN, and for its *impairment* she may recover.

Evidence of such impairment is admissible under the declaration in this case. She is therefore entitled to a trial upon the merits.

Ry. Co. *vs.* Humble, 181 U. S., 57, 63-4.
Hamilton *vs.* R. R. Co., 17 Mont., 334, 352.
Ry. Co. *vs.* Harris, 122 U. S., 597, 608.
Harmon *vs.* R. R. Co., 165 Mass., 100, 104.
L. W. Pomerene Co. *vs.* White, 70 Nebraska, 171, 176.
R. R. Co. *vs.* Kremple, 103 Ill. App., 1, 3.
Brooks *vs.* Schwerin, 54 N. Y., 343, 349.
Wade *vs.* Leroy, 20 How., 34, 44.
R. R. Co. *vs.* Dick, 78 S. W. (Ky.), 914.
Samuels *vs.* Ry. Co., 124 Calif., 294, 296.
R. R. Co. *vs.* Hecht, 115 Indi., 443, 446.

As the record now stands it may be true that the wife was a seamstress and that her husband so injured her hand as to permanently prevent her from engaging in such occupation. Upon that state of facts she would be entitled, under the declaration, to show such facts at the trial, together with the damages suffered by her in consequence thereof.

There seems to be no good reason why the case should not be thenceforth subject to the same incidents as any other suit for assault and battery, such as the award of exemplary damages, if justified by the evidence.

Nor is there any good reason why a woman of wealth should not respond in damages for wilfully and maliciously impairing her husband's earning capacity (R., 7).

Argument to the contrary would but serve to strengthen the position of the plaintiff in error.

Public Policy.

Considerations of public policy are to be determined by Congress. If the effect of the law, or any part thereof, as enacted is contrary to sound public policy Congress will repeal or amend the law. If, in the meantime, however, the construction sought by the plaintiff in error would undermine the basis of society or disregard the sanctity of home, she is bound to hope that her plea will be denied.

In any well regulated community litigation of this kind, between parent and child, would be deprecated, and if instituted when avoidable, might be, properly characterized as vicious in principle, but it would not be suggested that a sound public policy denies the *right* to bring the suit, and it would be strange if an action at law, rather than a suit in equity, should conduce to estrangement between the parties to a suit between husband and wife, or furnish grist for the divorce courts.

The same argument would apply to the jurisdiction of the criminal courts.

The husband, by his plea, is willing to admit that he did beat, bruise, wound, and illtreat his pregnant wife (R., 2).

The Court of Appeals bases its conclusion upon the proposition that the parties are one in law (R., 7).

The court had previously said that that was the feudal notion and not the Christian notion.

Carroll *vs.* Reidy, 5 App. Cas. D. C., 59, 62.

The plaintiff in error would seem to have been justified, under advice of counsel, in considering that, by its latest utterance, taken in connection with *Carroll vs. Reidy,* the court had extended to her an invitation to seek redress as *fully* and *freely* as if she were unmarried, and, upon the verdict of a jury, to submit her case to the judgment of a court of law.

Bronson *vs.* Brady, 28 App. Cas. D. C., 250, 263.

Respectfully submitted,

WM. M. LEWIN,
Attorney for the Plaintiff in Error.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1910.

No. 17.

JESSIE E. THOMPSON,
PLAINTIFF IN ERROR,

vs.

CHARLES N. THOMPSON.

BRIEF FOR DEFENDANT IN ERROR.

Statement of Case

The plaintiff in error brought her action against the defendant in the Supreme Court of the District of Columbia, setting up in her declaration, containing seven counts, seven alleged assaults upon her by the defendant, and asking damages in the sum of Seventy Thousand (70,000) Dollars or Ten Thousand (10,000) Dollars for each assault. The defendant pleaded the general issue,

and, as a special plea in bar, that at the time of the alleged assaults the defendant and plaintiff were husband and wife. To the special plea the plaintiff demurred. The demurrer was overruled, and the plaintiff electing to stand upon it, judgment was entered in favor of the defendant. From that judgment an appeal was taken to the Court of Appeals of the District of Columbia, by which Court the judgment of the Court below was affirmed. (31 App. D. C., 557.) The case comes into this Court upon a Writ of Error to the Court of Appeals of the District of Columbia.

THE POINT IN ISSUE.

The sole question in the case is:

Can an action be maintained in the District of Columbia by a wife against her husband for a tort committed by him against her person during coverture?

ARGUMENT.

At common law, owing to the doctrine of unity of husband and wife, an action could not be maintained by either against the other. In addition to this restraint which was common to both, the wife was under various other restraints as to her rights to control her property and to sue and be sued. These restraints upon the wife have been greatly modified by the Code of Law for the District of Columbia which contains the following provision:

> "Sec. 1155. POWER OF WIFE TO TRADE, AND TO SUE AND BE SUED.—Married women shall have power to engage in any business, and to contract, whether engaged in business or not, and to sue separately upon their contracts, and also *to sue separately* for the recovery, secur-

> ity, or protection of their property, and *for torts committed against them, as fully and freely as if they were unmarried;* contracts may also be made with them, and they may also be sued separately upon their contracts, whether made before or during mariage, and for wrongs independent of contract committed by them before or during their marriage, as fully as if they were unmarried, and upon judgments recovered against them execution may be issued as if they were unmarried; nor shall any husband be liable upon any contract made by his wife in her own name and upon her own responsibility, nor for any tort committed separately by her out of his presence without his participation or sanction: *Provided,* That no married woman shall have power to make any contract as surety or guarantor, or as accommodation drawer, acceptor, maker, or indorser."

It is contended by the plaintiff in error that the provision authorizing married women to "sue separately * * * for tort committed against them as fully and freely as if they were unmarried" is sufficiently broad and comprehensive to authorize a suit by a wife against the husband for tort committed against her person.

In opposition to this view, it is respectfully submitted that it was not intended by the Statute to effect the identity or unity of husband and wife with respect to each other; that it was merely intended to place the wife on an equality with her husband by removing the common law restraints imposed upon her, which were not imposed upon him; and that, while as to other persons it places her, with respect to the right to sue and be sued, in the same position as an unmarried woman, her relations to her husband are not affected except as expressly provided in the Statute. These views are strengthened, it is believed, by the fact that the Statute appears to have been enacted

for the benefit of married women. Its tendency, like that of all recent legislation in this regard, both in England and in the United States, as pointed out in *Wills vs. Jones.* 13 *App. D. C.*, 482, 495—

> "is towards the total emancipation of married women from all the old feudal restraints imposed upon them by the common law as the supposed consequence of the legal unity of husband and wife, and the present trend of public policy is to place them in all their business relations with the world upon a plane of perfect equality with those who are unmarried."

The Section does not purport to relieve married men of any restraints which the common law imposed upon them or to confer privileges which they did not enjoy before. As pointed out by the Court of Appeals, if the wife is authorized to sue her husband under the Section, the husband is also authorized to sue the wife; and it is not believed that it is reasonable to impute to Congress the intention of making *by implication* such a radical departure from the common law and such a striking change in this fundamental legal conception of the marriage relation, as it exists in all Anglo-Saxon countries.

A review of the decisions of the Courts of the various States with respect to similar Statutes show that the decision of the Court of Appeals is entirely in accordance with the rule followed by the Courts generally, that Statutes enabling the wife to sue and be sued as a *feme sole* do not authorize either husband or wife to bring an action against the other.

21 *Cyc.* 1517, 1518.

Section 450 *of the New York Code of Civil Procedure* provides that a married woman shall appear, prosecute and defend in all actions "as if she were single."

Section 3, New York Statute of 1862, provided:

> "Any married woman may bring an action in her own name for damages, *against any person,* or body corporate, for any injury to her person or character, the same as if she were sole."

In *Alward vs. Alward, 2 N. Y. Supp.* 42, which was an action by a husband against his wife to recover monies paid out and advanced by him in the management of her separate estate, the Court reviewed the numerous New York decisions relating to the married woman's acts of that State and reached the conclusion that they do not destroy the unity of husband and wife and do not enable them to sue each other at law. The Court said:

> "The Statutes hereinbefore referred to, being in derogation of the common law, are to be construed strictly. As stated by Dwarris: 'It is not to be presumed that the legislature intended to make any innovation upon the common law further than the case absolutely requires.' The application of this canon of construction makes it necessary, therefore, to find some enactment, which in express terms and not inferentially, confers upon husband and wife the right to maintain against each other an action at law.
>
> "It would be an unwarranted perversion of this design to hold, as would be necessary in this case, that the acts in question conferred upon the husband a privilege which was not afforded him at comon law. But I prefer to base my decision upon the broad principle that the sound and sensible rule which obtained at common law relating to the unity of husband and wife has not yet been so far abrogated as to confer upon them the much coveted privilege of bringing their quarrels into a court of law."

In *Smith vs. Gorman,* 41 *Me.,* 405, 408, the Court, in considering the Statute of Maine, which provided that the wife might sue in law or equity "as if she were unmarried," said:

> "The Statute is in derogation of the common law and is not to be construed as giving the wife a right of action against the husband unless it results from the express terms of the Statute, or from necessary implication. * * * The right of prosecution and defense is co-extensive. If the wife may sue the husband, the husband may sue the wife. The Statute gives no mutual right of action between each other to the husband and wife, and none such exists by the common law."

In *Small vs. Small,* 129 *Pa. St.,* 366, 372, 373, the Court had under consideration the following section of the Pennsylvania Statute:

> "Husband and wife shall have the same civil remedies upon contracts in their own name, against all persons, for the protection and recovery of their separate property as unmarried persons."

The lower Court held, because of the broad language authorizing suit "against all persons," that husband and wife might sue each other.

The Appellate Court, in reversing the Court below, said:

> "The general purpose of the act is clear enough. It is to give to married women the same freedom of ownership, control, and disposition of their property and earnings, and the rights and remedies incident thereto, that men have over theirs. It accordingly confers upon them the absolute power of disposition of their personal property,

> but requires the joining of the husband in the mortgage or conveyance of real estate. The rights of action * * * are given as means of maintaining the rights of property conferred by the sections themselves, and there is nowhere any indication of a purpose to extend them beyond their character as a necessary incident for that purpose. Still less is there any indication of a purpose to extend the rights or powers of a husband, which a right to sue the wife under the construction of Sec. 4 contended for would certainly do." * * *
>
> "It is impossible to suppose that so important a branch of the subject as the right of action between husband and wife should not have been thought of, or being thought of, should not have been granted, in unequivocal terms, if intended to be granted at all."

In some of the States actions are allowed by the wife against the husband in cases of wrongs done her property, but it is believed that in most such instances where such actions have been allowed, they are expressly authorized by the Statute.

21 *Cyc.* 1517, 1518, 1519.

The following will serve as illustrations of the class of cases in which such actions have been allowed:

In *Larison vs. Larison,* 9 *Ill. App.* 27, 31, an action relating to property was allowed under the Illnois Statute, which provides:

> "Should either husband or wife unlawfully obtain or retain possession or control of property belonging to the other, * * * the owner of the property may maintain an action therefor, * * * in the same manner and to the same extent as if they were unmarried."

In the case *in re Deaner,* 126 Ia., 701, a Statute, identical in terms with the Illinois Statute, was considered, and the wife allowed to sue her husband upon his promissory note.

In *Jones vs. Jones,* 19 *Ia.,* 236, a replevin suit for the recovery of property in a suit between a husband and wife was allowed, where the wife had abandoned her husband for cause.

Similar illustrations are found in—

Greer vs. Greer, 24 *Kan.,* 101.
Manning vs. Manning, 79 *N. C.,* 293.

Coming to the specific question involved in the case at bar, viz: Whether a husband or a wife may maintain an action for tort committed by either against the other during coverture, an examination of the authorities discloses, we believe, that no Court of last resort has held that such an action can be maintained under any Statute in force in any of the States of this country.

The Iowa Code 1873 provided that married women might prosecute and defend all actions at law or in equity for the preservation and protection of their rights and property as if unmarried. (Sec. 2211.) It also authorized actions between husband and wife with respect to property of the one, of which possession or control had been obtained by the other. (Sec. 2204.)

In *Peters vs. Peters,* 42 *Ia.,* 182, *and Heacock vs. Heacock,* 108, *Ia.,* 540 (75 *Am. St. Rep.,* 273), it was held that the changes made had not reached the extent of allowing either husband or wife to sue the other for personal injuries committed during coverture, and that—

> "there is no language in these acts, which looks to the removal of any disabilities under which the husband labored at common law."

In *Decker vs. Kedley,* 148 *Fed.,* 681 (C. C. A. 9th Circuit), the question before the Court was whether an action could be maintained under the Alaska Statute to recover damages for the tort of a husband who wilfully and wantonly failed to furnish the wife with necessaries during coverture. The Court, referring to the Alaska Statute and similar Statutes enacted by the States, said:

> "Such Statutes do not mean that the husband is answerable to the wife in damages for failture to supply her with the necessaries of life, or for any other act or failure of duty connected with or arising from the marital relation, and it has never been so held. Such a right of action, it is enough to say, * * * is wholly at variance with the theory of the marital relation, and is unknown to English or American jurisprudence."

In *Main vs. Main,* 46 *Ill. App.,* 106, it was held that under the Illinois Statute, which is similar to the Statute under consideration, the wife could not, after divorce, sue her husband for false imprisonment committed before the divorce was granted, because the Statute did not, by direct terms or necessary inference, abrogate the rule that husband and wife connot sue the other for tort.

In *Libbey vs. Berry,* 74 *Me.,* 286, it was held that the Act of 1876, providing that a married woman—

> "may prosecute and defend suits at law or in equity, either for tort or contract, in her own name, without the joinder of her husband, for the preservation and protection of her property and personal rights * * * as if unmarried, or may do it jointly with her husband,"

authorizes her only to maintain alone such actions as previously could be sustained when brought by the husband alone, or by the husband and wife jointly; and so does not give her a right of action against her husband for assault and battery.

To the same effect is *Abbott vs. Abbott, 67 Me.*, 304.

In *Bandfield vs. Banfield, 117 Mich.*, 80, it was held that Statutes conferring upon a married woman the right to bring actions in relation to her sole property in the same manner as if she were unmarried, would not be construed to give by implication a right of action to a married woman against her husband for personal tort.

The New York cases cited, *supra*, deal with actions between husband and wife as to contract or property rights. Those cited in the opinion of the Court below show the results reached by the New York Courts, in dealing with the exact question under consideration in this case. With one single exception, it has been uniformly held that under the New York Statute, which authorized an action for damages by a married woman *"against any person,"* "for any injury to her person or character, the same as if she were sole," do not authorize an action in tort by the wife against the husband. The exception referred to is the case of *Schultz vs. Schultz, 27 Hun.*, 26, in which the Court below refused to follow the conclusion reached in *Freethy vs. Freethy*, 42 *Barb.* (*N. Y.*), 641, and other New York cases, and held that the wife could maintain an action against the husband for assault and battery. That case, however, was reversed by the Court of Appeals of New York in 89 N. Y., 644.

In *Abbe vs. Abbe, 22 App. Div.*, 483 (48 *N. Y. Supp.*, 25) it was held that the provisions of the Domestic Relations Act of 1896, giving a wife a right of action for an

injury to her person, or against her husband for an injury arising out of the marital relation, did not authorize the maintenance of an action by a wife against her husband for assault and battery, because the Act did not destroy the unity of husband and wife.

In *Strom vs. Strom,* 98 *Minn.,* 427 (6 *L. R. A. N. S.,* 192), it was held that a married woman could not either before or after divorce maintain a civil action against her husband for personal tort committed by him against her during coverture under a Statute, which included a provision that—

> "women shall maintain the same legal existence and legal personality after marriage as before marriage."

The Court said:

> "The purpose of the Statute was to place the husband and wife on an equality as to actions by either for injuries to person, reputation or property. The husband cannot and never could bring an action against his wife for a personal tort committed by her against him during coverture."

In view of the decisions of the Courts upon this question, we believe that it may be safely said that the Courts of last resort are unanimous in holding that the various enabling acts, which have been enacted in the different States of the Union, will not be so construed as to confer by implication upon married women the right to sue their husbands for tort committed during coverture. It can hardly be doubted that the men who framed the section of the Code we are considering had knowledge of the similar Statutes which had been enacted in the various

States and of the construction which had been placed by the Courts upon those Statutes. In view of this situation, if Congress intended to confer such a right upon married women, it is hardly conceivable that it would have been conferred by implication instead of by express provision.

It is respectfuly submitted that the judgment of the Court of Appeals should be affirmed.

A. E. L. LECKIE,
CREED M. FULTON,
JOSEPH W. COX,
Attorneys for Defendant in Error.

JOHN A. KRATZ, JR.,
Of Counsel